

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

	X	
In re DIGITAL MUSIC ANTITRUST	:	MDL Docket No. 1780
LITIGATION	:	
	X	Assigned to: Judge Loretta A. Preska

  

JOINT RULE 26(f) REPORT AND CASE  
MANAGEMENT STATEMENT

Pursuant to Fed. R. Civ. P. 26(f), plaintiffs and defendants propose the following Joint Rule 26(f) Report and Case Management Statement and discovery plan in the above-captioned case (the “Action”). As to each issue, the parties attempted to reach agreement. Where they were unable to do so, each party’s position is set forth separately:

**I. Pleadings and Parties**

Plaintiffs filed the First Consolidated Amended Complaint (“FCAC”) on April 13, 2007. Pursuant to Case Management Order No. 3, entered March 12, 2007 (“CMO No. 3”): (1) on May 14, 2007, defendants provided plaintiffs with a letter summarizing the grounds for defendants’ anticipated motion to dismiss; and (2) on June 13, 2007, plaintiffs filed a Second Consolidated Amended Complaint (the “SCAC”). Defendants filed a motion to dismiss the SCAC on July 30, 2007, which is fully briefed.

**Parties’ Position:**

The parties will submit a Joint Pretrial Order no later than 30 days after the disposition of any motions for summary judgment or, if no such motions are made, not later than 30 days after the close of all discovery.

**Plaintiffs’ Position:**

Except upon a showing of good cause, and in any event no later than 180 days after the commencement of fact discovery: (1) no additional parties may be joined; and (2) no additional claims may be asserted.

**Defendants’ Position:**

Pursuant to the Court’s CMO No. 3, no additional amendments to the SCAC are permitted and, therefore, no additional parties may be joined and no additional claims may be asserted.

## **II. Discovery**

### **A. Generally**

#### **Plaintiffs' Position:**

The parties have not engaged in any formal discovery to date. Fact discovery may proceed at any time and shall be completed by December 5, 2008. Expert discovery shall be completed by January 11, 2009. Phasing of discovery will not promote a more expeditious or efficient resolution of this dispute.

#### **Defendants' Position:**

The scope, timing and format of pretrial discovery that is appropriate in this action will depend on which claims (if any) survive defendants' motion to dismiss. Accordingly, there shall be no discovery in this Action unless and until the Court denies defendants' motion to dismiss the SCAC and defendants are required to answer the SCAC.

In addition, because resolution of plaintiffs' class certification motion will impact the scope of documents relevant in this Action, discovery in this Action should be phased. Thus, as set forth in Part III below, discovery relevant to plaintiffs' motion for class certification shall begin only after defendants have served their answers to the SCAC, and merits discovery shall begin only after the Court issues a decision with respect to the appropriateness of certifying a class or classes in this Action.

Within 30 days after a decision with respect to plaintiffs' motion for class certification, the parties may serve their initial requests for documents and initial interrogatories with respect to the merits. The parties shall produce responsive documents on a rolling basis starting 45 days after these initial requests are served. An appropriate end date for fact discovery shall be set upon disposition of the class certification motion.

**B. Discovery Plan**

**Plaintiffs' Position:**

**1. Initial Disclosures**

In lieu of initial disclosures, plaintiffs are willing to depose a corporate designee from each of the defendants to ascertain corporate organization and the identity of persons who have information relevant to a claim or defense in this Action. In the alternative, the parties will exchange initial disclosures as required by Fed. R. Civ. P. 26(a)(1) by December 21, 2007.

**Defendants' Position:**

The initial disclosures contemplated by Fed. R. Civ. P. 26(a)(1) are not appropriate in the context of a case of this complexity.

**2. Government Investigations/*In re Napster Copyright Litigation*,  
MDL No. 00-001369 (MHP) (N.D. Cal.)**

**Plaintiffs' Position:**

Defendants shall produce all documents and other materials that have been previously produced to the Office of the New York State Attorney General and the United States Department of Justice in connection with their investigations into the pricing and distribution of digital music, and all documents and other materials produced in the *In re Napster, Inc. Copyright Litigation*, No. MDL 00-1369 MHP (N.D. Cal.), concerning the pricing and distribution of digital music, by December 21, 2007.

**Defendants' Position:**

The scope, timing and format of pretrial discovery that is appropriate in this action will depend on which claims (if any) survive defendants' motion to dismiss. Accordingly, there shall be no discovery in this Action unless and until the Court denies defendants' motion to dismiss the SCAC and defendants are required to answer the SCAC. (*See* II.A "Defendants' Position" above.) In addition, materials produced in the *Napster* litigation, including materials produced by third

parties, are subject to protective orders and defendants may not agree to their production absent permission of those third parties and/or of the *Napster* court.

### **3. Expert Discovery**

#### **Plaintiffs' Position:**

Plaintiffs will disclose their trial experts and submit their expert report(s) no later than 20 days after the close of fact discovery, reserving their rights to disclose additional experts for rebuttal. Defendants will then disclose their trial experts and serve their expert report(s) no later than 30 days after service of plaintiffs' expert report(s). Plaintiffs will then submit rebuttal expert reports no later than 21 days after service of defendants' expert reports. Expert depositions will be completed no later than one month after the service of plaintiffs' rebuttal report(s), and there will be only one deposition of each expert.

#### **Defendants' Position:**

It is premature to set a schedule for expert discovery at this time. The parties shall meet and confer on this issue at the start of fact discovery.

### **4. Fact Depositions**

#### **Parties' Position:**

Each fact deposition will adhere to the seven hour limitation set forth in Fed. R. Civ. P. 30(d)(2), except that plaintiffs and defendants will meet and confer regarding extending the seven hour limitation in the case of certain deponents who are in possession of sufficient information such that a seven hour limitation is not practicable. The parties will meet and confer concerning the number of depositions each side may take.

**5. Requests for the Production of Documents, Interrogatories and/or Requests for Admission**

**Parties' Position:**

The parties shall meet and confer concerning the number of requests for production of documents, interrogatories and requests for admission in this Action.

**6. Protective Orders**

**Parties' Position:**

The parties shall enter into a stipulated protective order pursuant to Fed. R. Civ. P. 26(c). The parties are currently meeting and conferring regarding the terms of such a stipulation and will present the Court with a proposed stipulated protective order within 60 days.

**7. Privilege Logs**

**Parties' Position:**

Privilege logs and supplements thereto should be provided in compliance with applicable law, no later than 60 days following the production from which privileged documents are withheld.

**III. Class Certification**

**Parties' Position:**

Plaintiffs' motion for class certification will be served and filed no later than 150 days after defendants have filed and served their answers. Defendants' opposition will be served and filed 90 days after service of plaintiffs' motion. Plaintiffs' reply will be served and filed no later than 60 days after service of defendants' opposition. If the parties support their papers with any expert opinions, the parties shall also produce expert materials contemplated by Fed. R. Civ. P. 26, subject to any limitations or expert disclosures agreed to by the parties.

The parties are currently meeting and conferring regarding the terms of a stipulation regarding discovery related to testifying experts and will present the Court with a proposed stipulated order within 60 days.

#### **IV. Dispositive Motions**

##### **Plaintiffs' Position:**

At this point in the litigation, plaintiffs do not believe any claims or issues may be determined by motion for summary judgment. Nevertheless, any motions for summary judgment made pursuant to Fed. R. Civ. P. 56 must be filed by March 6, 2009. Briefs in opposition to any motions for summary judgment are due April 3, 2009, and reply briefs in further support of any such motions shall be due April 24, 2009.

##### **Defendants' Position:**

It is premature to set a schedule for filing summary judgment motions at this time. The parties should meet and confer on an appropriate schedule for filing summary judgment motions at the beginning of expert discovery.

#### **V. Trial**

##### **Plaintiffs' Position:**

This matter is appropriate for a jury trial. This matter should be marked as ready for trial in an expedited fashion on or after July 24, 2009. Pursuant to the Honorable Loretta A. Preska's Individual Practices, by June 12, 2009, each party must file: (1) requests to charge and proposed *voir dire* questions; (2) all evidentiary motions, including motions *in limine*, if any; and (3) a pretrial memorandum, if any.

**Defendants' Position:**

It is premature to set a trial date at this time. The parties should meet and confer on an appropriate trial date at the close of discovery.

DATED: November 30, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 30, 2007.

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